84-543

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF ARKANSAS PETITIONER

V.

RANDY LEWIS BAIRD
HENRY EDWARD HEIMEYER
and TERRY L. FORGY RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTICRARI
TO THE ARKANSAS COURT OF APPEALS

JOHN STEVEN CLARK
Attorney General

By: LESLIE M. POWELL
Assistant Attorney
General
Justice Building
Little Rock, Arkansas
72201
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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SEIZURE AT AN ADULT BOOKSTORE PURSUANT TO AN ARREST FOR THE SALE AND DISTRIBUTION OF OBSCENE MATERIALS OF A SINGLE COPY OF FORTY-SEVEN MAGAZINES DEPICTING "HARD-CORE SEXUAL CONDUCT ON THEIR COVERS IN PLAIN VIEW WAS "PRIOR RESTRAINT OF THE RIGHT OF EXPRESSION" IN VIOLATION OF RESPONDENTS' FIRST AND FOURTH AMENDMENT RIGHTS AS ENUNCIATED IN ROADEN V. KENTUCKY, 413 U.S. 96 1973)?

II.

WHETHER THE ADMISSION INTO EVIDENCE OF AN INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES WAS CONSTITUTIONAL AS DERIVING FROM AN "INDEPENDENT SOURCE?"

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals in this case appears at 12 Ark. App. 71, 671 S.W.2d 191 (1984). A copy of this opinion appears in the appendix. A petition for rehearing was denied on August 22,1984 and notice of this denial also appears in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3). Petitioner seeks review of an opinion of the Arkansas Court of Appeals in which was found a violation of respondents' First and Fourth Amendment rights under the United States Constitution pursuant to Roaden v. Kentucky, 413 U.S. 497 (1973). The opinion was rendered on June 20, 1984 with a petition for rehearing being denied

on August 22, 1984

Pursuant to Rule 17 of the Rules of the Supreme Court, petition submits that the opinion to be reviewed is in conflict with this Court's holdings in Roaden v. Kentucky, supra, and its underlying "prior restraint" cases. Petitioner submits further that the opinion is in conflict with this Court's holdings on the "independent source" rule applicable to evidence allegedly admitted in violation of the Fourth Amendment. See Segura v. United States, __ U.S. __, 104 S.Ct. 3380, 82 L.Ed.2d 99 (July 5, 1984)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One

> Congress shall make no law . . . abridging the freedom of speech, or of the press, . . .

Amendment Four

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

(c) Taken as a whole, lacks serious literary, artistic, political or scientific value.

STATEMENT OF THE CASE

Respondents were arrested on February 28, 1983 and charged with the sale and distribution of obscene literature, a misdemeanor under Ark. Stat. Ann. §41-3553 (Repl. 1977). Respondents appealed a municipal court conviction to the Miller County Circuit Court where they were tried by a jury and again convicted on June 8, 1983. Baird was fined $250.00; Heimeyer was fined $250.00 and sentenced to to thirty days in the Miller County Jail; and Forgy was fined $500.00 and sentenced to sixty days in the county jail.

Prior to trial in the circuit court, respondents filed a motion to suppress evidence (forty-seven magazines) seized from the State Line Book Store. A hearing

was held on the motion June 3, 1983. This motion was denied, but the seized evidence was not introduced at trial. A list of the titles of the seized items was introduced. Two magazines purchased by a police officer prior to the seizure were also introduced, without objection.

Respondent's specifically relied on Roaden v. Kentucky, 413 U.S. 96 (1973) in their brief in support of their motion to suppress in the trial court. (See Appendix C.) The State argued that neither a mass seizure, nor prior restraint had occurred and that the seizure was reasonable. (See Appendix D.) The trial court rejected each contention in the respondents' motion. (See Appendix E.)

On the appeal, respondents again relied on Roaden and the State argued that Roaden allowed the finding of

a reasonable seizure under the circumstances of this case. The Arkansas Court of Appeals found a violation of the First and Fourth Amendments under Roaden and reversed and remanded the case as to Baird and Heimeyer. As to Forgy, the court found any error harmless beyond a reasonable doubt and affirmed. A petition for review was denied, but the mandate of the Arkansas Court has been stayed pending review of this petition in this Court.

Chief Justice Mayfield dissented on the grounds that the list of titles did not result from the seizure, but rather from the officers' independent observation of the titles in plain view. (See Appendix A)

Petitioner seeks review of this opinion by this Court as it is in conflict with previous opinions of this

Court. Specifically, respondent submits that Roaden was incorrectly applied under the circumstances of this case and that the list of titles should not be suppressed as "fruit" of that search.

REASONS FOR GRANTING THE WRIT

I.

THE SEIZURE OF FORTY-SEVEN MAGAZINES DEPICTING "HARD-CORE SEXUAL CONDUCT" ON THEIR COVERS WAS NEITHER "PRIOR RESTRAINT" OF RESPONDENTS' FIRST AMENDMENT RIGHTS UNDER ROADEN V. KENTUCKY, 413 U.S. 96 (1983), NOR AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.

The United States Supreme Court stated in Roaden v. Kentucky, 413 U.S. 96 (1973) that "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 413 U.S. at 501. The applicability of Roaden to the circumstances of this case was specifically argued by both sides before the trial court and before the Arkansas Court of Appeals. At a suppression hearing, the Miller County Circuit Court found the seizure reasonable.

As to the limit on the type of material seized and the setting within which it was seized. The Arkansas Court of Appeals found these same facts to represent an unreasonable seizure under Roaden. The State submits that the seizure was neither "prior restraint" of respondents' First Amendment rights, nor an unreasonable seizure under the Fourth Amendment and respectfully requests review of the opinion of the Arkansas Court of Appeals. The United States Supreme Court stated in Roaden:

> The common threat of Marcus, A Quantity of Books, and Lee Art Theatre is to be found in the nature of the materials seized and the setting in which they were taken. [Cite omitted.]
>
> In each case the material seized fell arguably within the First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents

> essentially the same restraint on expression as the seizure of all all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression whether by books or films, calls for higher hurdle in the evaluation of reasonableness. (Emphasis added.)

413 U.S. at 503-504.

In the instant case, there was not an abrupt halt to the redistribution or exhibition of the seized magazines. The State recognizes the arguable protection offered by the First Amendment to printed material, but submits that the "higher hurdle" of review in "prior restraint" cases is not applicable where only one copy of forty-seven magazines was seized pursuant to an arrest for the sale and distribution of obscene material.

The Fourth Amendment only prohibits unreasonable seizures and the purpose of the exclusionary rule is to deter illegal police activity. Mapp v. Ohio, 367 U.S. 643 (1961). Although they did not obtain a search warrant in this case, the police officers did act in good faith and diligently endeavored to proceed in accordance with the law. They sought legal advice from a judge who referred them to the prosecuting attorney. The prosecutor and a deputy advised them as to the applicable definition of "hard-core sexual conduct." Ark. Stat. Arn. §41-3585.1 (Repl. 1977) They first made a "buy" of two magazines showing explicit sex acts on the covers which they reasonably believed to come under this definition. The officers followed fairly objective standards

of looking for actual penetration of genitals, oral or anal openings. On the basis of the buy, they then obtained an arrest warrant for the owner of the store.

They proceeded to the book store which was the only known address of the owner. Upon arrival, they saw in plain view numerous other magazines depicting explicit sex acts comparable to the magazines purchased previously. They seized only one copy of each magazine on the display rack which depicted hard-core sexual conduct on the cover. No sex toys or films were seized. The store was not closed down.

It must also be noted that exigent circumstances were in evidence by the very name of the store -- State Line Books. The destruction of evidence was possible by simply walking across the street with it; a clear possibility

following the discovery of an outstanding arrest warrant for the owner. Baird and Heimeyer were arrested following their admissions that they worked there and the officers' observation of the obscene material. Neither the admissibility of the purchased magazines nor the arrests of appellants was challenged below. (The seized magazines were not introduced into evidence at the trial. See Point II. The obscene nature of the purchased magazines was not raised as an issue on appeal.)

Acting upon legal advice and with an arrest warrant, the officers lawfully entered the book store. Due to its state line location and the plain view observation of other obscene material, the officers conducted a seizure of limited scope. There was no willful misconduct, no attempt

to shut down the establishment. Little privacy is expected in a commercial establishment and no deterrent value would arise from the exclusion of this evidence.

Under the totality of the circumstances of this case, the State submits that the limited seizure of the magazines was reasonable under the guidelines enunciated in Roaden v. Kentucky, supra.

II.

THE ADMISSION INTO EVIDENCE OF AN INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES WAS CONSTITUTIONAL AS DERIVING FROM AN "INDEPENDENT SOURCE".

A list of the titles of the forty-seven magazines was introduced into evidence as State's Exhibit No. 5, but the magazines themselves were not offered into evidence. Chief Justice Mayfield rejected in his dissenting opinion the holding that the "list was a part of the unlawful seizure". He stated further:

> All the police did to obtain the list was to write the titles of the magazines on a piece of paper. They didn't have to even touch the magazines to do that. They were rightly in the store and they could stand in front of the rack, read the magnificently descriptive titles, and simply write them down.

The United States Supreme Court in Nix v. Williams, __ U.S.__ (June 11, 1984) quoted from Wong Sun v.

United States, 371 U.S. 471 (1963) as follows:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [371 U.S. at 487-488]

In Nix, the "inevitable discovery" rule was enunciated which limits the application of the exclusionary rule where the evidence would have inevitably been discovered by constitutional means. Nix also recognized the "independent source" rule which was further developed in Segura v. United States, ___ U.S. ___ (July 5, 1984). This rule limits the exclusionary rule where the connection between the illegal police conduct and the discovery and seizure of the evi-

dence is so "attenuated as to dissipate the taint."

Clearly the titles of these magazines were not discovered by any illegal means. The police were lawfully present in the book store and could see the titles in plain view. Even the majority opinion recognizes that the police could have made a list of these titles in order to obtain a warrant. The fact that the officers seized the magazines does not affect the independent basis of their knowledge of the titles. For whatever purpose the list was made, it only contains information which was obtained by lawful means. The names do not become "sacred and inaccessible" because the officers also seized the magazines themselves. See Silverhorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)

The officers were acting on legal advise and in good faith. Applying the exclusionary rule to the circumstances of of this case would have little deterrent value. The State submits that the admission into evidence of the list of titles was constitutional as the facts contained therein derived from an independent source.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on a writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner submits that the Arkansas Court of Appeal's opinion is in direct conflict with Roaden v. Kentucky, supra, and Segura v. United States, supra.

Petitioner recognizes that review on a writ of certiorari is discretionary and submits that this case is worthy of consideration based on this Court's recent opinions in Fourth Amendment cases.

Therefore, for these reasons and

the authorities cited in this petition for a writ of certiorari, petitioner respectfully prays that this Court will vacate the opinion of the Arkansas Court of Appeals and remand the case for further consideration under the direction of this Court as to the applicability of Roaden and Segura.

Respectfully submitted,

JOHN STEVEN CLARK
Attorney General

By: Leslie M. Powell

LESLIE M. POWELL
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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit has been served on respondents herein by mailing a copy of same, postage paid, to Clyde E. Lee, 217 Walnut Street, Texarkana, Arkansas 75502 and Lewis F. Mathis, 505 W. 5th Street, Suite C, P.O. Box 2783, Texarkana, Texas 75504-2783, this 19th day of October, 1984.

Leslie M Powell

LESLIE M. POWELL
Assistant Attorney
General

EN BANC
ARKANSAS COURT OF APPEALS

12 ARK. APP. 71(84)

NO. CACR 83-187

Opinion Delivered
June 20, 1984

RANDY LEWIS BAIRD,
HENRY EDWARD HEIMEYER
and TERRY L. FORGY
APPELLANTS

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM MILLER
COUNTY CIRCUIT COURT

HONORABLE PHILIP
PURIFOY, CIRCUIT
JUDGE

AFFIRMED IN PART AND
REVERSED AND REMAN-
DED IN PART

TOM GLAZE, Judge

Appellants Terry Forgy, Randy Baird and Henry Heimeyer were charged with violation of Ark. Stat. Ann. §41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. Appellant

Forgy is the owner of the State Line Book Store in Texarkana, and the other appellants are employees there. They were convicted in Texarkana Municipal Court and appealed to the Circuit Court of Miller County. After a trial de novo before a jury, they were again convicted. Baird was fined $250; Heimeyer was fined $250 and sentenced to thirty days in the county jail; and Forgy was fined $500 and sentenced to sixty days in the county jail. After careful deliberation of the points raised by appellants on appeal, we affirm the conviction of Forgy and reverse the convictions of Baird and Heimeyer.

On February 28, 1983, Major Cowart of the Texarkana Police Department entered the State Line Book Store and told Forgy, who was alone, that he was there to check on some permits for the store

and to see if a city occupational tax had been paid. Major Cowart left the store, returned to police headquarters and ordered Officer Adcock to go to the store and buy two "obscene" magazines. Officer Adcock purchased two magazines from Forgy. After the purchases, the officers sought advice from the prosecuting attorney's office concerning whether they needed a search warrant before returning to the store. Based on that advice, the police believed that they had probable cause to arrest Forgy and returned to the book store to make the arrest and seize other obscene material. At approximately 4:00 P.M., February 28, five police officers -- armed with an arrest warrant for Forgy -- went to the book store to arrest him, but they found Baird in the store alone. Baird testified that the

officers first began taking magazines off the rack and then asked if Forgy was there. He confirmed the officers did not have a search warrant to search the premises. After seizing forty-seven different magazines and simultaneously making a list of their titles, the officers arrested Baird and Heimeyer, who had entered the store sometime after the seizure of the magazines had begun. The officers determined the magazines were obscene by looking only at the covers of the magazines.

At trial, in addition to testimonies of the officers describing the magazine covers they saw in the book store, the State introduced the two magazines purchased as proof of the appellants' violation of the statute. The State chose not to offer into evidence the forty-seven magazines seized by the officers when they returned to arrest

Forgy, but it did introduce a list of the titles of the forty-seven magazines. Vulgar titles typical of those on the list were: "The Fucking Sucking Sisters," "Pussies For Sale," "Lez Pussy Lickers," "Ass Slappin'," and the like. The trial court admitted the two magazines and the list of titles into evidence; however, it refused to admit an "adult film" offered by the defense in their efforts to show Texarkana's relaxed community standard regarding obscene material.

Appellants raise eight points for reversal. However, only four of the arguments are based on objections made at trial, and according to Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980), only those arguments can be heard by this Court. Two of the remaining four arguments can be easily resolved, and we will do so before addressing the other, more complicated, issues.

Appellants Baird and Heimeyer contend that because Forgy had actually sold some magazines and they had not, the trial court erred in not granting their motion to sever. This argument is, in effect, a claim that the State's evidence against Forgy is stronger than the evidence against them. The relative strength of the State's case against each co-defendant is a proper factor for a court to consider when when ruling on a motion to sever; however, ever, it is only one of several factors for for the court to consider. See McDaniel v. State, 278 Ark. 631, 648 S.W.2d 57 (1983). Significantly, the evidence offered against the appellants was essentially the same, differing mainly in that Forgy sold two obscene magazines, but the other appellants kept or exposed obscene magazines. Given the totality of circumstances present in this case,

particularly in the absence of antagonistic defenses between Baird and Heimeyer and Forgy, the trial court's refusal to grant the motion to sever was not an abuse of discretion, and this Court will not disturb it on appeal. See McDaniel, supra.

All of the appellants also urge this Court to reverse their convictions because of the trial court's refusal to admit into evidence an adult movie then playing in Texarkana. Appellants offered the film in support of their claim that relaxed community standards regarding pornography existed in Texarkana. The State objected to the film's introduction on irrelevancy, lack of foundation and best evidence grounds. The trial court refused to let the jury see the film, stating, "[T]he jury itself represents the community and is in a (sic) inherent position to apply community standards to

the case before it." The trial judge did permit the manager of the theater then showing the adult film to testify. The manager stated that the film contained scenes of "sexual acts and simulated sexual acts," and that the film was available to adults in the community.

Relevancy rulings are, of course, within the trial court's discretion and will only be reversed for an abuse of that that discretion. Hamblin v. State, 268 Ark. 497, 597 S.W.2d 589 (1980). Given the possibility of confusion on the part of the jurors, we do not think the trial judge abused his discretion in refusing to admit the film into evidence. Also, the the film should not have been admitted into evidence because the proffered evidence showed only that the film was available in Texarkana. Before a proffer of material is admissible as probative

of community standards on obscenity, the proponent must establish a reasonable degree of community acceptance of the proffer of material; however, mere availability in the community of the proffered material does not, of itself, prove the material measures up to the community standard. See Hamling v. United States, 418 U.S. 87, 125-26 (1974); United States v. Pinkus, 579 F.2d 1174, cert. dismissed 439 U.S. 999 (1978).

We now turn to the issue that gives us the most difficulty. Appellants argue that the seizure of the magazines by the police officers violated their rights protected by the First and Fourth Amendments to the United States Constitution. Because the seizure of the magazines was unconstitutional, the appellants contend that the list of the titles of the magazines that was compiled as part

of that seizure was inadmissible against them. Citing Roaden v. Kentucky, 413 U.S. 497 (1973), appellants contend the police seizure of the magazines was unreasonable. In Roaden, a county sheriff in Kentucky viewed a film at a drive-in theater and, based on his own predisposition, concluded that it was obscene. Without a prior determination by an impartial magistrate of the obscene nature of the film or a search warrant, the sheriff arrested the manager of the theater and seized the film. The United States Supreme Court held that such a seizure was invalid. Reiterating that the seizure of books and film arguably protected by the First Amendment is to be assessed in light of a "higher hurdle in the evaluation of reasonableness" than the seizure of dangerous weapons or stolen goods, the Court concluded that police officers should not make this determina-

tion based upon their own subjective determinations of obscenity. In order to fully protect First Amendment rights, the police should let an impartial and neutral magistrate determine whether probable cause exists for the seizure of the alleged obscene materials.

In the instant case, as in Roaden, the police officers had no search warrant when they made the seizure of the allegedly obscene material; there had been no prior independent judicial determination concerning whether the allegedly obscene material was, in fact, obscene and the seizure of the material was based solely on the observations of the police officers. Given the holding of Roaden, we must conclude that the police officers' seizure of the magazines in this case violated the appellants' First Amendment free speech rights and their Fourth Amend-

ment right to be free of unreasonable searches and seizures. See also Gibbs v. State, 255 Ark. 997, 504 S.W.2d 719 (1974). Because the list was part of the unlawful seizure, it, too, must be suppressed. Mapp v. Ohio, 367 U.S. 643 (1961). So long as police officers do not conduct an illegal seizure of material protected by the First Amendment, they are at liberty, just as other members of the public, to enter book stores. Once the police are lawfully present in the book store, they may take notes and compile lists to prepare themselves to go before an impartial magistrate and testify in order to obtain a proper search warrant That procedure simply was not employed here. Thus, given the doctrine of Roaden, the admission of the list of the magazine titles was error warranting at least a reversal and a remand for a new trial for appellants

Baird and Heimeyer. Forgy's situation differs, and we hold he is not entitled to a new trial even though the list was erroneously admitted into evidence against him. The inadmissibility of the list of the vulgar titles in no way taints the admissibility of the two obscene magazines that Forgy undisputedly sold to the police.[1] The sale of these magazines was not, of course, a "seizure" of the magazines. See Johnson v. State, 351 So.2d 10 (Fla. 1977); Wood v. State, 144 Ga.App. 236, 240 S.W.2d 743 (1977), cert. den. 439 U.S. 899 (1978); State v. Hughes, 519 S.W.2d 19 (Mo. 1975); People v. Peters 82 N.Y.Misc.2d 138, 368 N.Y.S.2d 753 (1975); Carlock v. State, 609 S.W.2d 787 (Tex.Crim.App. 1981).

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[1] In this appeal, no one challenges the obscenity law under which appellants were charged; nor do they contend the two magazines were not obscene.

Therefore, because the sale of the magazines was not a seizure of protected First Amendment material, the Roaden doctrine does not apply to the admission of the two magazines that were purchased. Even though the list should not have been admitted against Forcy, the evidence, in the form of the two magazines that he sold, is so overwhelming that the error, even if it is of constitutional proportions, is harmless beyond a reasonable doubt. Ark R.Civ.P. 61; Pace v. State, 265 Ark. 712, 580 S.W.2d 689 (1979).

Appellants Baird and Heimeyer also question the sufficiency of the evidence against them as their eighth point for reversal. Given our disposition of their constitutional argument, we will not decide this issue. Vowell v. State, 4 Ark. App. 175, 628 S.W.2d 599, rev'd on other grounds, 276 Ark. 258, 634

S.W.2d 118 (1982).

In sum, because of the constitutional violation of Baird's and Heimeyer's First and Fourth Amendment rights, we reverse their convictions and remand to the trial court. We affirm the conviction of appellant Forgy.

AFFIRMED IN PART AND REVERSED IN PART.

Cracraft, J., concurs.

Cooper, J., concurs in part and dissents in part.

Mayfield, C.J., dissents as to Heimeyer and Baird.

JAMES R. COOPER, Judge, concurring in part, dissenting in part.

I concur in the majority opinion insofar as it reverses the convictions of the appellants Baird and Heimeyer because of the prejudicial error inherent in the introduction of the list of magazine titles. I respectfully dissent from the majority's affirmance of the appellant Forgy's conviction when that same error is present as to him. Although the majority opinion says it, I disagree that the admitted error was "harmless beyond a reasonable doubt". Two slightly inconsistent rules apply where error occurs in a criminal case: first, the Arkansas Supreme Court has stated that to reverse in a criminal case, the error must be prejudicial, not harmless, and that the appellant must demonstrate error. Wilson v. State, 272 Ark. 361, 614 S.W. 2d 663 (1981). However, the

Supreme Court has also stated that, "[O]ur settled rule is that error is presumed to be prejudicial unless we can say with confidence that it was not." Vaughn and Wilkins v. State, 252 Ark. 505, 479 S.W.2d 873 (1972). Whichever rule one chooses to apply, I think that the introduction of the list was just as much a prejudicial error as to Forgy as it was to the other two appellants. Although there is other evidence against Forgy, I am unwilling to agree that, with confidence, this Court should say that the error was harmless. I would reverse and remand for a new trial for Forgy, as the majority has seen fit to do as to Baird and Heimeyer.

MELVIN MAYFIELD, Chief Judge,

dissenting opinion.

I do not agree with the conclusion of the majority opinion that "given the doctrine of Roaden, the admission of the list of the magazine titles was error warranting . . . a reversal and a remand for a new trial for appellant's Baird and Heimeyer."

The majority holds that the "list was a part of the unlawful seizure" of forty-seven magazines that the police officers took off the rack of the book-store when they went there with a warrant to arrest the owner of the store. The magazines were not offered in evidence; and, in my view, the list was not even "seized" much the less part of an "unlawful seizure." All the police did to to obtain the list was to write the titles of the magazines on a piece of paper. They didn't have to even touch

the magazines to do that. They were rightly in the store and they could stand in front of the rack, read the magnificently descriptive titles, and simply write them down. Indeed, without writing anything, the officers would have to remember only a half-dozen words to adequately describe most of the titles.

The Roaden case has nothing to do with the admission of the officers' list into evidence. The "fruit of the poisonous tree" doctrine does not apply here because the list introduced into evidence did not result from an illegal search, seizure, or arrest. Wong Sun v. United States, 371 U.S. 471 (1963). Baird and Heimeyer do not contend that the forty-seven magazines were not obscene. The evidence supports the convictions. I would affirm.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

August 22, 1984

RE: CACR 83-187
Randy Lewis Baird, Henry Edward Heimeyer and Terry L. Forgy
v. State of Arkansas

Attorneys of Record:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied. Mayfield, J., would grant the State's petition as to Heimeyer and Baird."

Sincerely yours,

Dona L. Williams /s/

MOTION TO SUPPRESS

COMES NOW the above Defendant, through his attorneys, and respectfully move this Court for an order suppressing from use in evidence all materials heretofore seized.

AS GROUNDS FOR SAID MOTION, Defendant state:

I.

The failure to obtain a search warrant resulted in a search of Defendant's premises which was improvident and improper, and ignored the directives of the Supreme Court of the United States as the same allude to the sensitive treatment to be afforded presumptively protected speech material.

II.

The scope of the search was overly broad and permitted a police officer to become the censor of the County of Miller, all in violation of Defendant's

state and federally protected rights.

III.

The lack of a search warrant had the end result of a police officer determining what is, or what is not, obscene, contrary to the mandates of the United States Supreme Court.

IV.

The lack of a search warrant led a mass seizure of presumptively protected material without affording such material a right to a prior hearing concerning the obscenity vel non of same, and violated Defendants' rights of speech and expression.

V.

The failure to obtain a search warrant is contrary to the well established principle that a neutral magistrate strate failed to focus searchingly on the issue of the obscenity vel non of the material.

WHEREFORE, Defendant prays that the court suppress from use as evidence all materials taken pursuant to said search, and that such materials be forthwith returned to the Defendant as required by law.

Respectfully submitted,

Clyde E. Lee /s/
217 Walnut Str.
Texarkana, Ar 75501

* * *

In the instant case police officers conducted a mass search of the Defendant's premises and seized numerous presumptively protected speech materials without the aid of a search warrant. This precise type of disobedience to the First and Fourteenth Amendments was unequivocally rejected by the United States Supreme Court in Roaden v. Kentucky, 413 U.S. 496 (1973). Because the Defendant believes Roaden is dispositive in favor of his contention that the speech

search and seizure in the instant case is constitutionally infirm, it is appropriate to quote that decision at some length.

* * *

THE COURT: Do you wish to make a statement in closing?

MR. HUDSON: I would like to make a brief statement. First, here is no precedent either in his brief or in the law for holding that every seizure of contraband requires a search warrant. It is well established that under normal circumstances many arrests lead to the detection of obviously illegal materials that can be seized pursuant to that type of arrest. I think the testimony today has shown that a legal arrest under the criminal procedures in the state of Arkansas was made. These two magazines were placed before proper authorities. They were purchased legally, counseling sought and a determination that probable cause existed for an arrest was made. An arrest warrant was issued and in searching

for Mr. Forgy at the only address known to the police at that time, other materials that were obviously pornographic were seized. The arrest warrant was issued through the statutory procedure of having the municipal clerk take the affidavit of the officer or complaining witness and issue a warrant. All of these items were in plain sight at the time the search for Mr. Forgy was made. In fact, Mr. Forgy did arrive at the address before the arrest was over with, I believe, and the evidence is clear that the location of these materials was such that a fifty foot walk would get them out of the jurisdiction of the court. Contrary to the brief and arguments of Mr. Lee, there has been no evidence of a mass seizure. In fact, most of the inventory was left at the book store. Only those materials necessary to a determination of the obscenity question were

taken; one of each, not all of them. And nothing that did not indicate its obscene nature on the cover, on the face, of the material was taken. I think it falls squarely within the requirements of a warrantless search and the materials should be admissible at trial.

* * *

THE COURT: All right, Mr. Lee, as you have stated, alluded to the fact you have filed a brief in support of your Motion to Suppress and of which I was furnished a copy this morning and read it during the noon hour with much interest, as to your Motion to Suppress as to paragraph one, that point is denied, paragraph two is denied, paragraph three is denied, paragraph four is denied, paragraph five is denied.

Based on that, I find that the material is admissible for trial.

END OF JUNE 3RD PROCEEDINGS

PLAINTIFF'S EXHIBIT NO. 2

Taken as evidence from State Line Books 414 State Line Avenue on Monday, February 28, 1983 at 5:05 P.M.

47 Copies

1. Nookie Nympho
2. The Fucking Suck Sisters
3. Fight'n Juicy
4. Horny Hardon
5. Father Knows Best
6. Voluptua
7. Body Talk
8. Pussies for Sale
9. Baby Cakes
10. Lusty Ladies
11. Cyncrmus
12. Fringe Benefits
13. Indigo Series

    (Crossed out name)

    (Crossed out name)

14. Vertigo
15. Mandarin Delights

16. Voluptua # One

17. Sensua

18. Pussy Buster

19. Suckarama

20. Cynormus

21. Penthouse Pussy #1

22. The Ride

23. Maximum #6

24. Indigo Series #3

25. Voluptua #3

    (Crossed out name)

26. Lez Pussy Lickers

27. Erotic Dimensions 1

28. Vertigo #2

29. Tit for Two

30. Executive Sweet

31. Oral #1

32. Chinatown Pussy Pusher #1

33. Maximum #8

34. Favors

35. Black Ass Fucker

    (Crossed out name)

(Crossed out name)

36. Anal Intruders #1

37. Sex Goddesses #3

38. Oriental Nookie #2

39. T.V. Life #1

40. Ass Slappin

41. Private Lessons #1

42. Magnum Griffin #1

43. Magnum Griffin #3

44. Magnum Griffin #5

45. Workout

46. Flick Trick

47. Super Shaft

Sgt. B. Moore /s/
PSO B. Jones /s/
Randy Baird /s/
Jon Heimeyer /s/